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SECRETARY, BOARD OF
OIL, GAS & MINING

**BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH**

UTAH CHAPTER OF THE SIERRA CLUB,
SOUTHERN UTAH WILDERNESS
ALLIANCE, NATURAL RESOURCES
DEFENSE COUNCIL, and NATIONAL
PARKS CONSERVATION ASSOCIATION,

Petitioners,

DIVISION OF OIL, GAS AND MINING,

Respondent,

ALTON COAL DEVELOPMENT, LLC

Intervenors,

**DIVISION'S RESPONSE TO
PETITIONERS' LIST OF
CULTURAL RESOURCE AND AIR
QUALITY ISSUES**

Docket No. 2009-019
Cause No. C/025/0005

The Division of Oil, Gas, and Mining ("Division"), by and through counsel hereby submits the following Response to Petitioners' list of Cultural Resource and Air Quality Issues.

PROCEDURAL BACKGROUND

The Division has previously filed its Response to the Petitioners' list of Geologic/Hydrologic Issues based on the email exchange with Mr. Morris indicating the Petitioners were submitting their list of issues as an amendment to the Request For Agency

Action (“RAA”). At that time the Petitioners had not made the same claim for the identified Cultural Resource and Air Quality Issues and Ms. Buccino demurred when asked if that was the intention. Subsequently on April 119, 2010 Petitioners have filed their Petitioners’ List of Issues to be Presented and affirmed that the list identifies the issues that are being substituted and that the prior issues are waived.¹

RESPONSE

Accordingly the Division hereby Responds to the itemized of issues as follows.

Cultural Resource Issues

The Division objects to the amendment of the RAA to add Cultural Resource Issues 1 through 3².

1. Reply to Issue1. The original RAA only challenged the failure of the Division to consider impacts to the Panguitch National Historic District (“PNHD”). The Division filed its Motion to Dismiss and the Board indicated that subject to limited questions about the inquiry it was inclined to grant the motion. The additional issues now identified raise new issues that involve a substantial amount of additional evidence and preparation to present.

In addition, and more importantly, the Division has determined, based on recent communications from Alton Coal Development, LLC (“ACD”),³ that a third cultural resource

¹ “Petitioners intend to present for decision only the issues listed below. Conversely, Petitioners do not intend to prosecute, and hereby waive the right to present evidence.” Petitioners List of Issues to be Presented, filed April 19, 2010.

² 1. Whether the Division’s determination of eligibility and effect related to cultural and historic resources covered the entire permit area approved for the Coal Hollow Mine.

2. Whether the Division’s determination of eligibility and effect related to cultural and historic resources covered any area outside the permit area approved for the Coal Hollow Mine.

3. Whether the Division considered a mitigation plan for any cultural or historic outside the permit area approved for the Coal Hollow Mine.
resources located wholly outside of the permit area.

inventory completed in July of 2008 had not been submitted to the Division based on the assumption that the entire permit area had been inventoried by earlier surveys, and that ACD discovered that the Division that it had failed to include an other identified archeological site in its requests for concurrence from the State historic Preservation Officer (“SHPO”) and in its proposed mitigation. The Division has determined that in order to meet the requirements of R645-300-133.600 that the Division has taken into account the effects of the proposed permit on properties listed on and eligible for listing on the National Register of Historic Places that the permit must include a condition that the operation plan will protect the two new identified sites by mitigation acceptable to the SHPO or by avoidance of the two sites.

Since this is a new condition, neither the Division nor the Petitioners were aware of the need for this condition when the List of Issues was presented. The first issue regarding the status of cultural review of the permit area cannot be accurately reviewed based on the information available at the time of the filing of the RAA. The Division asks that this issue not be heard at the April 28, 2010 hearing, and that the Petitioners be permitted to raise the issue after the condition has been submitted as part of the permit and the SHPO has concurred in the identification. The Division believes that this can occur prior to the May 22, 2010 hearing date.

Reply to Issues 2 and 3. Issues 2 and 3 concerning the identification of cultural resources and mitigation plans for cultural resources outside of the permit area except to the extent that they are included in the question about the consideration of the PNHD, were also not part of the objections and deficiencies alleged in the RAA as filed and they Division objects to their last minute inclusion and joins in ACD objection to the amendment to add these issues.

³ ACD asked to meet with the Division and for the first time advised the Division of the inadvertent failure to submit the prior survey on April 20, 2010, and the discovery of the other omitted site within the Permit Area.

Without waiving these objections in Response to Issues 2 and 3 of the Cultural Resource issues, the Division asserts that the Division has made a determination of eligibility and effect related to cultural and historic resources for areas outside the permit area (the adjacent area) approved for the Coal Hollow Mine, and has considered a mitigation plan for cultural or historic resources outside the permit area in the adjacent area approved for the Coal Hollow Mine.

As a Further Response the Division alleges as follows.

Surveys obtained by ACD for this project and the LMU Request to lease adjoining BLM coal has resulted in a survey of all lands within ¼ mile of the permit area. All of the sites identified by class III surveys on these adjoining lands have been evaluated for eligibility. The Division had these surveys before it and included these surveys in its request for concurrence in the identification of eligible and effected sites. The request specifically identified five sites that adjoined or straddled the permit area. Some of these sites extended as much as several hundred feet outside of the permit area in the adjacent area. The Division determined that the sites would be avoided and this was included in the plan for mitigate or prevent harm submitted to the SHPO for the project and this plan for avoidance for these sites was concurred with by the SHPO.

All of the other surveyed and identified sites further outside of the permit area will also be avoided by any mining operations. It is reasonable to conclude that there will not be an adverse effect to cultural or historic properties for any area larger than those areas considered that overlap the permit boundary. Accordingly, the Division has fully considered the effect of the project on the adjacent area and the identification and mitigation for these lands has been concurred with by the SHPO.

Reply to Issue 4. The Division denies that it was required to identify and address the effect of the proposed Coal Hollow Mine on the Panguitch National Historic District before approving the mine permit.

As a further Response the Division reasserts the arguments as set forth in its Motion to Dismiss Certain issues filed January 12, 2010, and further alleges as follows.

The Division has fully complied with the requirements of the requirements of Utah Code § 9-8-404. The obligations for coordination with the SHPO as provided for in the Coal Act and its regulations do not require the incorporation of federal requirements when the lands in question are not federal. The SHPO's concurrence is based on the Division's identification of lands affected by the project and the Division's determination is not extended by any requirements of Utah Code § 9-8-404. The requirement to consider adjacent lands is a determination required to be made by the Division in accordance with the Coal Act and its regulations and is not enlarged by Utah Code § 9-8-404 or federal regulations

Air Quality Issues.

In response to the Air Quality Issues 5 to 9, the Division Responds as follows.

Reply to Issue 5. The Division has determined that the Fugitive Dust Control Plan for the Coal Hollow Mine meets the requirements of the Division, but also notes that it must be approved by the Utah Division of Air Quality ("DAQ").

Reply to Issue 6. The Division denies that the Division of Air Quality is required to provide the Division of Oil, Gas and Mining with an evaluation of the effectiveness of the Fugitive Dust Control Plan for the Coal Hollow Mine prior to the Division's approval of the mine permit.

As a further Response the Division alleges as follows.

The applicable regulation provides that an air quality monitoring program be implemented that provides “sufficient data to evaluate the effectiveness of the fugitive dust control practices...to comply with federal and Utah air quality standards.” Utah Admin. Code R645-301-420(423.100). The determination that the monitoring program provides sufficient data to evaluate the effectiveness of fugitive dust control practices in compliance with federal and Utah air quality standards can be made after the Division’s approval since obtaining DAQ approval is a condition of the permit. Reply to Issue 7. The Division alleges that there is no obligation for the DAQ to provide notice to the Division of Oil, Gas and Mining of receipt of a complete air permit application from ACD for the Coal Hollow Mine.

Reply to Issue 8. The Division of Air Quality is not required to provide notice to the Division of Oil, Gas and Mining of approval of an air permit for the Coal Hollow Mine.

Reply to Issue 9. The Division is not required to wait for the DAQ’s evaluation of the Fugitive Dust Control Plan including the plan’s effectiveness in addressing the quality of the night skies before approving the Coal Hollow mine permit.

As a further Response the Division alleges as follows.

The approval of the fugitive dust control plan is within the jurisdiction of the DAQ and it is not possible for the Division to approve it. The DAQ has the expertise to make that evaluation. ACD must comply with the conditions for approval imposed by DAQ and it is not required that all non-DOGM approved regulatory approvals such as permits for discharges of water, or air be obtained before the permit decision.

The Fugitive Dust Control Plan relates to air quality generally. There is no requirement that the quality of the night skies be addressed. The Board has already stated “the controlling

regulations create no requirement to consider the impact of fugitive dust on night sky clarity.”

Board’s Order Concerning Motion to Dismiss, p. 3-4.

Respectfully submitted this 24th day of April, 2010



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CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy of the foregoing REPLY TO CULTURAL AND RESOURCES ISSUES to be sent by electronic transmission and to be mailed by first class mail, postage prepaid, the 26th day of APRIL, 2010 to:

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